No. 89-453

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1989

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METRO BROADCASTING, INC.,
*Petitioner*,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether the Federal Communications Commission's congressionally mandated policy of considering minority race as one of several factors in comparative licensing hearings in order to promote the First Amendment interest in diversity of expression in broadcasting is consistent with the equal protection component of the Fifth Amendment.

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## BRIEF OF THE NATIONAL LEAGUE OF CITIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, NATIONAL ASSOCIATION OF COUNTIES, COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, AND INTERNATIONAL CITY MANAGEMENT ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

---

### INTEREST OF THE *AMICI CURIAE*

The *amici*, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a strong interest in legal issues that affect state and local governments. This case concerns the constitutionality of the Federal Communications Commission's congressionally mandated policy of considering minority race as one of several factors in comparative licensing proceedings. Both Congress and the Commission have determined that this minority enhancement program is necessary to advance the government's compelling First Amendment interest in promoting diversity of expression in broadcasting.

This case is important to the *amici* because state, county, and municipal governments have enacted race-conscious programs not only to remedy discrimination, but also to achieve other compelling goals. In our view, this Court's cases clearly recognize the validity of other compelling purposes; but this case threatens non-remedial programs because of petitioner's insistence that only a remedial purpose can justify a race-conscious program. Moreover, many of these programs, like the Commission's policy at issue here, are based on legislative findings concerning problems and determinations of their best solution. *Amici* believe that these legislative findings and determinations should be accorded deference, not second-guessed by the courts. Thus, the constitutional validity of critical state and local government programs may be affected by the standards established with respect to the power of Congress to act in this case. See *City of Richmond v. J.A. Croson Co.*, 109 S.Ct. 706, 719 (1989).

*Amici* believe that the decision of the court of appeals is correct, and submit this brief to assist the Court in its resolution of the case.[1]

## STATEMENT

### A. Introduction.

Petitioner Metro Broadcasting, Inc., respondent Rainbow Broadcasting Company, and Winter Park Communications, Inc., which is not a party to this case, filed mutually exclusive applications with the Federal Communications Commission for use of a new UHF television channel in Orlando, Florida.[2] Petitioner contends that the Commission violated the equal protection component

[1] The parties' letters of consent, pursuant to Rule 37 of the Rules of this Court, have been filed with the Clerk.

[2] The administrative proceedings leading to the award of the license to Rainbow are well described in the court of appeals' opinion. Pet. App. 2a-6a.



of the Fifth Amendment by awarding Rainbow credit in a comparative licensing hearing for its significant minority ownership.[3]

### B. The Comparative Hearing Licensing Procedure.

If none of the parties who file mutually exclusive applications for a new channel is entitled to a preference under 47 U.S.C. § 307(b) for providing first or second service to a community,[4] or if more than one applicant could qualify for such a preference for serving the preferred community, the Commission conducts a comparative hearing at which it evaluates the applicants' relative qualifications. See, *e.g.*, *Buena Vista Telecasters*, 94 FCC 2d 625, 628 (Rev. Bd. 1983). At the hearing, the Commission considers both "quantitative factors," which focus on the integration of ownership into management, and "qualitative factors," which include minority ownership, local residence, civic participation, and prior broadcast experience. If one applicant has a clear quantitative advantage, it will receive the license so long as it is otherwise qualified and does not own other media interests. See, *e.g.*, *WHW Enterprises, Inc.*, 89 FCC 2d 799, 819 (Rev. Bd. 1982), rev. denied, 92 FCC 2d 1501 (1983), aff'd in part and rev'd in part on other grounds, 753 F.2d 1132 (D.C. Cir. 1985). The qualitative factors cannot outweigh a clear quantitative advantage. *Id.* at 817.

[3] Based on the Commission's determination that its gender preference would not affect the outcome of this case, the court of appeals correctly concluded that petitioner's challenge to the validity of that preference need not be reached. Pet. App. 10a n.5. In any event, this Court should not consider that issue in the absence of a decision by the court of appeals. See, *e.g.*, *Simmons v. West Haven Hous. Auth.*, 399 U.S. 510, 511 (1970) (per curiam); *Mattiello v. Connecticut*, 395 U.S. 209 (1969) (per curiam).

[4] A Section 307(b) preference normally entitles an applicant to the license without a comparative hearing. See *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1135 (D.C. Cir. 1985).

### C. History of the Commission's Minority Enhancement Program.

The Communications Act of 1934, 47 U.S.C. §§ 151-609, provides that the Commission shall grant a license to an applicant "if public convenience, interest, or necessity will be served thereby." See 47 U.S.C. § 307(a). Subsequent to the enactment of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and Congress's adoption of the *Report of the National Advisory Commission on Civil Disorders* (1968), the Commission focused attention on the low level of participation by minorities in the broadcast industry and its effect on diversity of expression.[5]

The Commission first attempted to facilitate expression of the viewpoints of racial minorities by attacking discriminatory employment practices. To this end, the Commission adopted regulations prohibiting broadcast licensees from discriminating against minorities in their hiring practices, including regulations requiring licensees to develop specific practices designed to guarantee equal opportunity in all aspects of station employment. See, *e.g.*, *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969).[6] This Court upheld those regulations, noting that they were "necessary to enable the FCC to satisfy its obligation under the Communications Act of 1934 . . . to ensure that its licensees' programming fairly reflects the tastes and viewpoints of minority groups." *NAACP v. FCC*, 425 U.S. 662, 670 n.7 (1976).

[5] The Commission has repeatedly indicated that it is committed to ensuring diverse programming because it "is a key objective not only of the Communications Act of 1934 but also of the First Amendment." *Statement of Policy on Minority Ownership of Broadcasting Facilities*, 68 FCC 2d 979, 981 (1978) ("*1978 Policy Statement*"). See also *Policy Statement on Comparative Broadcast Hearings*, 1 FCC 2d 393, 394 (1965) ("*1965 Policy Statement*").

[6] See also United States Commission on Civil Rights, *Window Dressing on the Set: an Update* (1979); United States Commission on Civil Rights, *Window Dressing on the Set: Women and Minorities in Television* (1977); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 60 FCC 2d 226 (1976); *Nondiscrimination in the Employment Policies and Practices of Broadcast Licensees*, 54 FCC 2d 354 (1975); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970).



In order to encourage program diversity and assist "television media in discharging their statutory responsibilities for service in the public interest," the Commission also developed standards for the "ascertainment of community problems and needs by commercial broadcast license applicants." *Ascertainment of Community Problems by Broadcast Applicants*, 57 FCC 2d 418, 418 (1976); see also *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650 (1971). This ascertainment program required each licensee to maintain in its public files a list of certain demographic aspects of its area, and to survey community leaders, particularly those representing the interests of racial and ethnic minorities and women. Licensees were then required to broadcast programming responsive to the interests indicated in the surveys.

Following a series of decisions by the United States Court of Appeals for the District of Columbia Circuit expressing that court's belief that ownership of broadcast facilities by minority licensees enhances diversity of programming,[7] the Commission reviewed the adequacy of its equal employment and ascertainment rules to achieve diversity of expression. The Commission concluded that:

> the views of racial minorities continue to be inadequately represented in the broadcast media. This situation is detrimental not only to the minority audience but to all of the viewing and listening public. Adequate representation of minority viewpoints in programming serves not only the needs

[7] See, *e.g.*, *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975); *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); *Citizens Communications Center v. FCC*, 447 F.2d 1201 (D.C. Cir. 1971).

> and interests of the minority community but also enriches and educates the non-minority audience. . . .
>
> Thus, despite the importance of our equal employment opportunity rules and ascertainment policies in assuring diversity of programming it appears that additional measures are necessary and appropriate. In this regard, the Commission believes that ownership of broadcast facilities by minorities is another significant way of fostering the inclusion of minority views in the area of programming.

*1978 Policy Statement*, 68 FCC 2d at 981-82.

Based on these findings, the Commission adopted a variety of measures designed to enhance diversity of expression through diversity of ownership.[8] *1978 Policy Statement*, 68 FCC 2d at 982-83. Concerning the use of qualitative enhancements, the Commission stated that "minority ownership involvement should continue to be a significant factor in comparative evaluations of applicants for broadcast authorizations." *Petition for Issuance of Policy Statement or Notice of Inquiry by National Telecommunications and Information Administration*, 69 FCC 2d 1591, 1595 (1978). See also FCC's Minority Ownership Task Force, *Report on Minority Ownership in Broadcasting* (1978).

**D. Congress's Interest in Encouraging Minority Ownership of Broadcast Facilities.**

Congress explicitly endorsed the Commission's use of race-conscious programs to increase diversity of expression when it enacted the Communications Amendments Act of 1982, Pub. L. No. 97-259, 96 Stat. 1087 ("1982

[8] In addition to the minority enhancement program at issue here, the Commission adopted the distress sale policy pending before the Court in *Astroline Communications Co. v. Shurberg Broadcasting of Hartford, Inc.*, No. 89-700 (cert. granted, Jan. 8, 1990), and a policy of issuing tax certificates permitting deferral of capital gains tax on sales of licenses to parties with significant minority interests. See *1978 Policy Statement*, 68 FCC 2d at 983.



Amendments").[9] That Act authorized use of a random selection system to award licenses (47 U.S.C. § 309(i)(1)), but also specified that any such system must incorporate "significant preferences" for minorities. *Id.* at § 309 (i)(3)(A).

The legislative history concerning this provision shows that "[t]he intent of the Congress in requiring such significant preferences in the administration of a lottery was to increase the number of media outlets owned by such underrepresented persons or groups, thereby fostering diversity of ownership in the media of mass communications."[10] H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 23, reprinted in 1982 U.S. Code Cong. & Admin. News 2261, 2267. The House Conference Report further notes that "[t]he nexus between diversity of media ownership and diversity of programming sources has been repeatedly recognized by both the Commission and the courts." *Id.* at 40, reprinted in 1982 U.S. Code Cong. & Admin. News at 2284. See generally Conf. Rep. on H.R. 3982, Omnibus Budget Reconciliation Act of 1981—Book 2, H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 896-98 (1981).

In 1983, Congress held hearings regarding minority participation in the media. See *Parity for Minorities in*

[9] In an attempt to increase minority ownership of broadcast stations, Congress had enacted similar legislation the previous year. See Pub. L. No. 97-35, 95 Stat. 357, 736-37 (1981); H.R. Conf. Rep. No. 208, 97th Cong., 1st Sess. 897 (1981). The Commission determined, however, that the legislation should not be implemented on the ground that the statute and the legislative history lacked specificity regarding the preferences that should be accorded to minorities in the lottery licensing scheme. *Random Selection/Lottery Systems*, 89 FCC 2d 257, 279 (1982).

[10] The legislative history also refers specifically to the *1965 Policy Statement*, and states that "[i]t is the firm intent of the Conferees that traditional Commission objectives designed to promote the diversification of control of the media of mass communications be incorporated in the administration of a lottery system." H.R. Conf. Rep. No. 765, 97th Cong., 2d Sess. 40, reprinted in 1982 U.S. Code Cong. & Admin. News 2261, 2284.

*the Media: Hearing on H.R. 1155 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 3, 125, 135-36, 147-49, 159-67, 194-95 (1983); *Minority Participation in the Media: Hearings Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 98th Cong., 1st Sess. 1, 4, 7-8, 137-39, 161-62 (1983). The testimony presented in these hearings explored the issues of minority underrepresentation in the broadcast industry and its adverse effect on programming diversity. Then, in 1984 and 1986, Congress again heard testimony regarding the nexus between minority ownership and program diversity. See *Corporation for Public Broadcasting Authorization: Hearing on S. 2436 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 98th Cong., 1st Sess. 78-94 (1984); *Minority-Owned Broadcast Stations: Hearing on H.R. 5373 Before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 1, 2, 51, 56-57, 89-90 (1986).

**E. The Appropriations Acts.**

In 1986, the Commission initiated a nonadjudicatory inquiry to explore the constitutionality of its minority preference policies. See *Notice of Inquiry on Racial, Ethnic or Gender Classifications (MM Docket No. 86-484)*, 1 FCC Rcd 1315, 1317-18 (1986), modified, 2 FCC Rcd 2377 (1987), closed, 3 FCC Rcd 766 (1988). Responding to the Commission's action, Congress included a provision in the Continuing Appropriations Act for Fiscal Year 1988 directing:

> That none of the funds appropriated by this Act shall be used to repeal, to retroactively apply changes in, or to continue a re-examination of, the policies of the Federal Communications Commission with respect to comparative licensing, distress sales and tax certificates granted under 26 U.S.C. 1071, to



> expand minority and women ownership of broadcasting licenses . . . .

Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). The Senate Appropriations Committee Report concerning this provision states:

> The Committee believes the inquiry [into the constitutionality of the Commission's minority preference policies] is unwarranted. . . . The Congress has expressed its support for such policies in the past and has found that promoting diversity of ownership of broadcast properties satisfies important public policy goals. Diversity of ownership results in diversity of programming and improved service to minority and women audiences. In approving a lottery system for the selection of certain broadcast licensees, the Congress explicitly approved the use of preferences to promote minority and women ownership.

S. Rep. No. 182, 100th Cong., 1st Sess. 76-77 (1987) (citations omitted).

Congress has in each subsequent year likewise directed that the Commission continue its race-conscious policies designed to foster diversity of expression. Specifically, in the Departments of Commerce, Justice, and State, the Judiciary and Related Agencies Appropriations Acts, 1989 and 1990, Congress again prohibited the Commission's use of federal funds to reexamine or repeal its policies regarding minority preferences. Pub. L. No. 100-459, 102 Stat. 2186, 2216-17 (1988); Pub. L. No. 101-162, 103 Stat. 988, 1020-21 (1989).

## SUMMARY OF ARGUMENT

A. This Court would have to repudiate the premise of its holdings in *Regents of the University of California v. Bakke*, 438 U.S. 265, 320 (1978) (opinion of Powell, J.), and *United Jewish Organizations v. Carey*, 430 U.S. 144, 161 (1977), in order to adopt the contention of petitioner and its *amici* that remedying past discrimination

is the only purpose that can justify a racial classification. Here, Congress and the Commission have a compelling interest in furthering First Amendment values by promoting diversity of expression in broadcasting. This interest extends to ensuring that the viewpoints of racial minorities are not excluded from the public airwaves, to protect not only minority broadcasters and their minority audiences, but also nonminorities who otherwise would be deprived of the benefit of full public discourse.

B. After considering the investigations and actions taken by the Commission, and after conducting its own hearings over several years, Congress concluded—repeatedly and without ambiguity—that viewpoints of racial minorities were underrepresented in broadcasting and that increasing the number of minority broadcasters was a necessary means of promoting diversity of expression. Congress's decision to focus on racial diversity of ownership as a means to promote diversity of expression follows the Commission's practice in seeking other types of diversity, and is mandated by the First Amendment limitations on regulation of content. Congress's decision does not depend in any way on racial stereotyping and is entitled to appropriate deference.

C. The Commission's congressionally mandated policy of considering race as one factor in comparative licensing hearings alleviates the documented underrepresentation of minority viewpoints, without imposing an undue burden on nonminorities. It is carefully designed to respect both the sensitivity of classifications based on race and the important First Amendment values implicated by the regulation of broadcasting. As such, the policy is "narrowly tailored" to its purpose of encouraging diversity of expression.



## ARGUMENT

### THE MINORITY ENHANCEMENT PROGRAM IS CONSISTENT WITH THE EQUAL PROTECTION COMPONENT OF THE FIFTH AMENDMENT.

#### A. Governments May Use Racial Classifications Not Only To Remedy Past Discrimination But Also To Achieve Other Compelling Purposes.

##### 1. *Introduction.*

This Court has previously held that governments may use race-sensitive measures not only to remedy past discrimination, but also to advance other compelling interests, particularly interests related to freedom of expression. A majority of this Court held in *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), that a public university may consider the race of applicants for admission in order to further its compelling interest in the exchange of diverse ideas in the academic context. *Id.* at 320 (opinion of Powell, J.). In *United Jewish Organizations v. Carey*, 430 U.S. 144 (1977), Justice White, writing for a plurality of the Court, stated that in protecting the " 'effective exercise of the electoral franchise' " (*id.* at 159) by racial minorities as mandated by the Fifteenth Amendment, "[t]he permissible use of racial criteria is not confined to eliminating the effects of past discriminatory districting or apportionment." *Id.* at 161.

Contrary to the arguments of petitioner and its *amici*, the recent decisions in *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), and *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), do not undermine this principle. *Wygant* found that a school board's goal of providing role models for minority children did not justify a policy granting preferential protection against layoffs to minority teachers. It is one of many cases in which this Court has expressed concern about the significant "burden that a preferential-layoffs scheme imposes on innocent parties" (476 U.S. at 282 (plurality

opinion); see also *Firefighters v. Stotts*, 467 U.S. 561 (1984); *United Steelworkers v. Weber*, 443 U.S. 193 (1979)), and does not suggest that goals other than remedying past discrimination cannot justify a racial classification that does not have such a severe impact on nonminorities.[11] In *Croson*, the only justification offered for the City's program was to remedy past discrimination, and the Court therefore had no occasion to address whether other compelling purposes may also justify race-conscious programs.[12]

To adopt the contentions of petitioner and its *amici*, the Court would have to repudiate its prior recognition that government may use race-conscious means to achieve compelling interests apart from remedying past discrimination. *Bakke* and *United Jewish Organizations* teach that where government controls the right to expression, by deciding who will have access to a forum critical to

[11] Indeed, Justice O'Connor's concurring opinion in *Wygant* explicitly acknowledges that "a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least in the context of higher education, to support the use of racial considerations in furthering that interest." *Wygant*, 476 U.S. at 286. Justice O'Connor went on to observe that nothing in *Wygant* "necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or 'compelling' to sustain the use of affirmative action policies." *Ibid.*

[12] Petitioner and its *amici* point to Justice O'Connor's statement in *Croson* that "[u]nless [racial classifications] are strictly reserved for remedial settings, they may in fact promote notions of racial inferiority and lead to a politics of racial hostility." 109 S. Ct. at 721. But Justice O'Connor cited for this proposition Justice Powell's opinion in *Bakke*, and particularly its discussion of the danger that preferential programs will stigmatize their beneficiaries. *Ibid.*, citing 438 U.S. at 298. In context, Justice O'Connor's statement is properly understood to express her view that all racial classifications are subject to the same searching scrutiny regardless of "the race of those benefited or burdened by a particular classification." 109 S. Ct. at 721. There is no reason to believe that Justice O'Connor implicitly abandoned in *Croson* the views that she so clearly expressed in *Wygant*. See n.11, *supra*.



public debate and political participation, the First Amendment creates a compelling interest in ensuring that the result of that allocation affords an opportunity for expression to diverse voices across a broad spectrum of society.[13] Here, as in those cases, the compelling First Amendment interest in diversity of expression justifies consideration of minority race.

### 2. *The First Amendment creates a compelling interest in diversity of expression in broadcasting.*

The First Amendment, that primary guarantee of self-determination provided by the Bill of Rights, "rests on the assumption that the widest possible dissemination of information *from diverse and antagonistic sources* is essential to the welfare of the public [and] is a condition of a free society." *Associated Press v. United States*, 326 U.S. 1, 20 (1945) (emphasis added). "It is designed and intended to . . . put[] the decision as to what views shall be voiced largely into the hands *of each of us*, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity and in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests." *Cohen v. California*, 403 U.S. 15, 24 (1971) (emphasis added).

This Court has held that the First Amendment "provides powerful reasons" for governmental action to ensure that access to the means of speech is not concentrated in a few hands, but given to a broad spectrum of society.[14] *Associated Press*, 326 U.S. at 20. Where

[13] In contrast to this case, *Wygant* and *Croson* involved simply the allocation of economic benefits, where the only compelling governmental interest is to ensure that the *process* of allocation is free from the effects of present or past racial discrimination.

[14] As this Court has recognized, "[t]here is no room under our Constitution for a . . . view [of the First Amendment that] would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Terminiello v. City of Chicago*, 337 U.S. 1, 4-5 (1949); see, *e.g.*, *Cohen v. California*, 403 U.S. 15, 25-27 (1971).

necessary, government must take action to prevent majority interests from suppressing minority access to public fora—whether that suppression takes the form of physical coercion (*Hague v. CIO*, 307 U.S. 496, 516 (1939)), or economic power. *Associated Press*, 326 U.S. at 20.

These First Amendment considerations require particular attention and action by government in the broadcasting context. Both Congress and this Court have long recognized that "broadcast frequencies constitute[] a scarce resource whose use could be regulated and rationalized only by the Government." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 376 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 210-13 (1943). Physical and technological constraints limit access to broadcasting frequencies so that government must not only regulate use of the airwaves, but also allocate access thereto. Of necessity, government must allow access to some and deny it to others. See *id.* at 215-16.

To an ever-increasing extent, use of the airwaves is critical to public and political discourse. Like other more traditional fora, the airwaves are "held in trust for the use of the public and . . . used for . . . communicating thoughts between citizens, and discussing public questions." *Hague v. CIO*, 307 U.S. at 515. As this Court observed in 1973, "[t]he electronic media have swiftly become a major factor in the dissemination of ideas and information." *CBS v. DNC*, 412 U.S. 94, 116 (1973). It is well understood and accepted that the broadcast media have a unique and critical impact on essential aspects of our democracy, including national elections and legislative and judicial processes. See *Buckley v. Valeo*, 424 U.S. 1, 19 (1976); *CBS v. DNC*, 412 U.S. at 129; see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 748-51 (1978).

Acknowledging the special nature of the broadcast media, this Court has recognized "the legitimate claims of those unable without governmental assistance to gain access to [broadcast] frequencies for expression of their



views," and has upheld Congress's and the Commission's interpretation and administration of the Communications Act to ensure access for such groups. See *Red Lion*, 395 U.S. at 400-01. Likewise, in holding that broadcasters may refuse paid editorial advertising, this Court stated that "the public interest in providing access to the marketplace of 'ideas and experiences' would scarcely be served by a system . . . heavily weighted in favor of the financially affluent" or the politically dominant. *CBS v. DNC*, 412 U.S. at 123.

For these reasons, Congress and the Commission clearly have a compelling interest in promoting diversity of expression in broadcasting. That interest extends to ensuring that the viewpoints of racial minorities are not excluded from the public airwaves, to protect not only the rights of minority broadcasters and their minority audiences, but also nonminorities who otherwise would be deprived of the benefit of full public discourse.

### B. The Legislative Determination That There Is A Nexus Between Diversity Of Ownership And Diversity Of Expression Is Entitled To Deference, Is Based On An Adequate Record, And Should Be Upheld.

#### 1. *Congress ratified and required continuation of the Commission's minority preference policies.*

After mandating in the 1982 Amendments that any lottery system for according licenses include minority preferences, Congress conducted hearings in 1983, 1984, and 1986 at which it further explored the problem of minority underrepresentation in the broadcast industry and its adverse effect on programming diversity. These congressional investigations followed development of similar evidence by the Commission over several years. With this background of investigation and prior legislation, Congress concluded in the Appropriations Acts—just as it had in the 1982 Amendments—that increasing minority ownership would increase diversity of programming, and on that basis directed the Commission to continue its minority enhancement program in full force and effect.

This legislative determination after investigation is entitled to appropriate deference by this Court, and should be upheld.

**2. *The Commission has historically used diversity of ownership—not content regulation—to encourage diversity of expression.***

Congress's decision to focus on diversity of ownership, rather than on regulation of content, follows the Commission's traditional means for achieving diversity of expression in broadcasting.[18] This approach is in large part mandated by this Court's explication of the restraints placed on government by the First Amendment. Since holding in *Red Lion* that the "fairness doctrine" is consistent with the First Amendment, the Court has rejected government efforts further to regulate *content* of speech to ensure the expression of diversity of views. See *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974); *CBS v. DNC*, 412 U.S. 94 (1973). The Court has indicated that government action to achieve a diversity of speakers in the broadcasting context is best accomplished through licensing procedures. See *CBS v. DNC*, 412 U.S. at 111, 113 & n.10; *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 802-03 (1978).

The fundamental First Amendment principles underlying these decisions are especially strong in the context of speech by racial minorities. Requiring broadcasters to express what the government finds to be the viewpoint

[18] The Commission's ownership regulations have historically included, among others, prohibitions on ownership or control of more than one station in the same broadcast service in the same community, limitations on the number of stations in each service under the control of one person or entity, prohibitions on common ownership of both a VHF television station and a radio station in the same market, and prohibitions on common ownership of a daily newspaper and a radio or TV station in the same community. See *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 780-81 (1978). In addition to these cross-ownership rules, the Commission also gives preference to residents of the area to be served by the station.



of a minority disenfranchises both the regulated broadcasters and the minority community, for whom the right of political participation is uniquely important. See *United Jewish Organizations*, 430 U.S. at 158-62 (plurality opinion); *Beer v. United States*, 425 U.S. 130, 140-41 (1976). Moreover, the prospect of having the government determine whether or not given speech reflects the views of a minority is repugnant to the core First Amendment right to expression untrammeled by government.

**3. *Congress's determination is entitled to deference.***

The Acting Solicitor General argues (U.S. Br. 25) that the considerable deference generally accorded congressional determinations is not due here because "Congress has never enacted a statute expressly directing or authorizing the Commission to prefer minorities in comparative license proceedings in order to increase programming diversity." This contention is meritless.

As explained above, Congress explicitly endorsed the Commission's policy of promoting diversity of expression by increasing the number of minority broadcasters when it required, by statute, that any lottery system for allocating licenses incorporate minority preferences. See 1982 Amendments. Thereafter, when the Commission began to reconsider its minority preference policies, Congress intervened and expressly prohibited the Commission from repealing, changing or even reexamining those policies. Pub. L. No. 100-202, 101 Stat. 1329, 1329-31 (1987). This prohibition, which was also incorporated in subsequent Appropriations Acts, could not have mandated more clearly that the Commission continue the minority enhancement program. Moreover, the legislative history of the Appropriations Acts, as well as the extensive history of prior congressional activity in this area, establishes beyond dispute that Congress has exercised *its judgment*, and has ratified the Commission's policies designed to increase programming diversity.[19]

[19] Judge Williams' characterization of this congressional action as a "kind of mental standstill" (Pet. App. 35a (Williams, J., dissent-

This legislative determination is not entitled to less deference merely because it is contained in Appropriations Acts. Those Acts, like any other legislation, represent "determinations of policy" properly implemented through "bicameral passage followed by presentment to the President" (*INS v. Chadha*, 462 U.S. 919, 954-55 (1983)), and must be accorded due weight.[17] *United States v. Dickerson*, 310 U.S. 554, 555 (1940) ("There can be no doubt that . . . [Congress] could accomplish its purpose by an amendment to an appropriations bill, or otherwise."); see *United States v. Will*, 449 U.S. 200, 222 (1980). It would be inappropriate indeed for this Court to tell a co-equal branch of government that a specific statutory provision duly enacted by Congress and signed into law by the President, in full accord with the Constitution, is entitled to less weight because Congress chose to include it in an Appropriations Act, rather than to make it a separate piece of legislation. See *United States v. Will*, 449 U.S. 200 (1980).

#### 4. *Congress had a sufficient factual basis for its action.*

Petitioner and its *amici*, following Judge Williams' dissent, also argue that Congress did not create a sufficient factual record to support its determination that increasing minority ownership would promote diversity of expression. They would require Congress to demonstrate

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ing)) is clearly inaccurate. Congress did not tell the Commission to maintain the status quo to allow time to study the matter. To the contrary, Congress told the Commission that there was *in Congress's view* no need for further study. See S. Rep. No. 182, 100th Cong., 1st Sess. 76-77 (1987). Congress's action can only be seen as a clear determination that the current policies are fully justified, and a mandate that they be continued.

[17] Petitioner's reliance on *TVA v. Hill*, 437 U.S. 153, 190 (1978), is misplaced. That case concerned whether an Appropriations Act should be construed to repeal prior legislation *by implication*. In contrast, the Appropriations Acts here specifically mandate continued implementation of the minority preference programs plainly and directly; there can be no doubt as to Congress's intent.



that there is an "empirically verifiable" definition of minority programming, that minority programming is currently inadequately supplied by the market, and that increasing minority ownership will increase the supply of minority programming. Pet. App. 22a (Williams, J., dissenting). This crabbed view of Congress's power misapprehends the nature of the legislative process, undervalues Congress's role in our constitutional system, and reflects inadequate appreciation for the sensitive First Amendment concerns at stake.

Under the standard employed in Judge Williams' dissent, legislative bodies would be required to make specific findings of fact, based strictly on evidence in the "record," that could be demonstrated to be true with the kind of certainty that is possible only in the physical sciences.[18] Legislative enactments would be subject to a stricter standard of review than decisions of a trial court, both as regards the type of evidence properly considered and the deference due the determination. Cf. *Fullilove v. Klutznick*, 448 U.S. 448, 502 (1980) (Powell, J., concurring).[19] Consequently, no matter how compelling the need, Congress would be powerless to adopt a race-conscious remedy where the nature of the problem did

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[18] In fact, the Congressional Research Service Report, *Minority Broadcast Station Ownership and Broadcast Programming: Is There A Nexus?* (1988), provides empirical support for Congress's conclusion. The alleged methodological flaws in this study that Judge Williams cited are of the type that, even in a court of law, which a legislature decidedly is not, would go to weight rather than admissibility. Pet. App. 23a-25a (William, J., dissenting).

[19] Findings of fact by a trial court generally must, of course, be upheld unless they are "clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 573-76 (1985). The implicit premise of Judge Williams' dissent is that Congress's legislative determinations in this area cannot be upheld unless specific evidence in the "record" demonstrates to a virtual certainty that they are correct. Judge Williams' approach would put legislative bodies in a straightjacket guaranteeing that scrutiny will always be "strict in theory, but fatal in fact." *Fullilove*, 448 U.S. at 507 (Powell, J., concurring).

not lend itself to strict empirical proof, but instead depended upon human experience and judgment.

Although racial classifications are properly subject to searching scrutiny, the power of a legislature to adopt race-conscious remedies to further compelling purposes has never been held to be so narrow. "Congress, of course, may legislate without compiling the kind of 'record' appropriate with respect to judicial or administrative proceedings." *Fullilove*, 448 U.S. at 478 (opinion of Burger, C.J.).[20] Even in *Bakke*, which involved only the policies of a university rather than a legislative enactment, Justice Powell did not demand "empirically verifiable" proof that racial diversity would facilitate the "robust exchange of ideas" and otherwise improve education. Instead, he relied on the opinions and experiences of educators, and observed that it "is widely believed" that diversity enriches the educational experience, and that "our tradition and experience lend support to the view that the contribution of diversity is substantial." 438 U.S. at 313.

A legislature's determinations are, of course, entitled to far greater deference than are those of a public university. *Fullilove*, 448 U.S. at 499 (Powell, J., concurring). Moreover, the factual record here is far greater than that deemed sufficient by this Court in *Bakke*. Congress conducted repeated hearings at which it heard extensive testimony exploring the relationship between minority ownership and diversity of expression.[21]

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[20] When Congress enacts legislation, it is permitted to rely upon historical documentation and previous congressional findings and investigations; it is not necessary for Congress to make specific findings for each individual piece of legislation. *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring). Consequently, the 1982 Amendments and the hearings conducted by Congress in 1983, 1984, and 1986, as well as the Commission's prior investigations, must be considered to have been before Congress when it enacted the Appropriations Acts.

[21] There is an additional reason for appropriate deference to Congress here beyond those recognized in *Fullilove*. As this Court has stated, "[b]alancing the various First Amendment interests involved in the broadcast media . . . is a task of great delicacy and difficulty," and the "delicately balanced system of regulation" that Congress devised and must continually adjust to accommodate those competing interests ought not easily be disrupted by the courts. *CBS v. DNC*, 412 U.S. at 102. Thus, in evaluating a constitutional challenge to Congress's broadcast regulations, the Court "must afford great weight to the decisions of Congress and the experience of the Commission." *Ibid.*



### 5. *Congress's determination does not depend on racial stereotyping.*

Congress's determination that racial minorities have a distinct viewpoint does not depend on racial stereotyping, or on any belief "that skin color is a sound basis for predicting behavior." Pet. App. 21a (Williams, J., dissenting). The facts, which Congress explored in hearings, are by no means so simple or mechanical as determining whether certain ethnic groups have distinct "tastes" and then measuring the amount of programming directed toward satisfying those tastes. As Justice Powell recognized in *Bakke*, we are all the product of our experiences; and diversity of programming implicates matters as rich, varied, and complex as all of human experience.

Members of racial and ethnic minority groups have something very important in common. As members of "discrete and insular minorities" (*United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938)), they have faced a long, sorry history of discrimination. Persons from different backgrounds—"whether it be ethnic, geographic, culturally advantaged or disadvantaged—may bring experiences, outlooks, and ideas" that will enliven debate and promote learning. *Bakke*, 438 U.S. at 314 (opinion of Powell, J.). It is no more "racial stereotyping" to conclude that the unique experience of members of minority groups will bring a different perspective to many issues, or that such groups will tend to have special interests in certain areas, than it is "stereotyping" to say that persons from different geographic areas or backgrounds will tend to have different perspectives and interests. Thus, for example, citizens of any race

may have a special interest in the history of slavery and segregation in the United States, or the abolition of apartheid in South Africa, and opinions of people of all races on those issues will vary. But whatever their views, black people will bring a different experience to bear on those issues than will white people, and it is not "racial stereotyping" to say so.[22] Congress properly determined that important First Amendment values are served by ensuring that racial minorities have an opportunity to make programming decisions.[23]

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[22] In the analogous context of protecting the right of racial minorities to effective political participation, the Court has adopted the fundamental premise of Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, that racial minorities may have different political views than the white majority. For example, in *United Jewish Organizations*, the Court upheld redistricting by the State of New York that deliberately created nonwhite majorities in electoral districts in an effort to comply with Section 5's intent to "protect the opportunities for nonwhites to be elected to public office." 430 U.S. at 158-59 (plurality opinion). Conversely, in *City of Pleasant Grove v. United States*, 479 U.S. 462 (1987), the Court affirmed the district court's holding that the City's annexations of two white areas and refusal to annex a black area could not pass muster under Section 5. The Court stated that government action "to provide for the growth of a monolithic white voting block, thereby effectively diluting the black vote in advance," was "impermissible." *Id.* at 472.

[23] Petitioner and its *amici* suggest that *Bakke* is distinguishable because racial diversity in a student body tends to break down stereotypes as students interact with persons of other races, whereas in broadcasting the audience does not know the race of the broadcaster. But Justice Powell's rationale in *Bakke* was by no means so limited. He recognized that "[t]he atmosphere of 'speculation, experiment and creation'—so essential to the quality of higher education—is widely believed to be promoted by a diverse student body" (438 U.S. at 312), and that universities have a compelling First Amendment interest in selecting students who will contribute "most to the robust exchange of ideas." *Id.* at 313. Thus, the thrust of Justice Powell's analysis is that racial diversity leads to diversity of expression, and that its absence may impoverish debate by excluding an important perspective. These considerations apply with equal force to broadcasting, which both serves an educational function and plays an important role in national and local politics.



Likewise, promoting diversity of expression by increasing minority ownership of broadcast licenses does not in any way depend on an assumption that there is "some inherently non-measurable race-conduct link" that would allow government to "pursue diversity of conduct by allocating government benefits on a basis of racial proportions." Pet. App. 28a (Williams, J., dissenting). Congress was not concerned here merely with allocation of economic benefits, and it did not assume that minorities will think, act, or behave in any particular way, any more than Justice Powell made that assumption in *Bakke*. Rather, Congress recognized the fundamental First Amendment principle that everyone benefits when the public airwaves are open to expression by a wide diversity of speakers from different backgrounds. It does not require positing an "ineffable attribute" of minorities or assuming a "race-conduct link" (Pet. App. 27a-28a (Williams, J., dissenting)) to recognize that racial diversity in broadcasting furthers First Amendment goals.[24]

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Moreover, the fact that audiences do not know a broadcaster's race eliminates one of the primary objections usually raised to racial classifications intended to aid minorities, including diversity admissions programs, *i.e.*, that they stigmatize their beneficiaries. See, *e.g.*, *Croson*, 109 S. Ct. at 721; *Bakke*, 438 U.S. at 298 (opinion of Powell, J.). Because the audience does not see the owner of a broadcasting facility, the audience has no cause to speculate about how he obtained his license. Each broadcaster will be judged on the merits of his programming.

[24] Recognizing the value of racial diversity to achieve diversity of expression in the special circumstance of selecting a student body or awarding broadcast licenses in no way permits government to avoid the constitutional limitations on government's use of race-based criteria when allocating economic benefits. In that context, government's interest is in ensuring that the process of allocation is free from the effects of present or past discrimination. Government may not engage in "discrimination for its own sake." *Bakke*, 438 U.S. at 307 (opinion of Powell, J.).

### C. The Minority Enhancement Program Is Narrowly Tailored To Its Purpose Of Promoting Diversity Of Expression.

#### 1. *The minority enhancement program does not involve a quota or rigid numerical goal.*

This Court has expressed concern about race-based programs that include "rigid numerical quota[s]" (*Croson*, 109 S. Ct. at 728), and has generally preferred programs without "inflexible percentages solely based on race or ethnicity." *Fullilove*, 448 U.S. at 473 (opinion of Burger, C.J.). See also *Bakke*, 438 U.S. at 316 (disapproving of "assignment of a fixed number of places to a minority group") (opinion of Powell, J.).

The Commission's minority enhancement program is significantly more flexible than the program approved in *Fullilove*, which involved a flat ten percent set-aside subject only to an administrative waiver provision. Nonminorities are free to compete for all licenses; no licenses are set aside exclusively for minorities; and race is considered only if all applicants are otherwise essentially equal, and then only as one factor. See *Bakke*, 433 U.S. at 314 (opinion of Powell, J.) (approving admissions programs in which race is one consideration). Moreover, there are alternative routes to obtaining a license—most notably private sales—in which race is not considered. It is difficult to imagine any meaningful policy that would less resemble "a rigid numerical quota" or an "inflexible percentage" and still serve the Commission's legitimate goals.

#### 2. *The minority enhancement program does not impose an undue burden on nonminorities.*

This Court has never suggested, as the Acting Solicitor General implies, that a "narrowly tailored" program must not "injure innocent third parties." U.S. Br. 23. Indeed, to impose such a requirement would be to condemn virtually all race-based programs, however essential to the achievement of compelling purposes. By definition, a program giving any meaningful preference based



on race in allocating access to a scarce or fixed resource will impose some burden on nonminorities.

Thus, for example, an applicant for admission to college who is turned away in favor of a minority candidate pursuant to a race-conscious admissions program is injured in a real sense. But this Court approved such programs in *Bakke*, recognizing that the injury to the disappointed applicant is outweighed by the compelling interest in diversity. Similarly, the nonminority contractor denied a contract under the plan approved in *Fullilove* is injured, but the "relatively light" burden imposed on him does not render the program unconstitutional. 448 U.S. at 484 (opinion of Burger, C.J.). See also *Wygant*, 476 U.S. at 280-81 (plurality opinion) ("[a]s part of this Nation's dedication to eradicating racial discrimination, innocent persons may be called upon to bear some of the burden of the remedy").[25]

The pertinent inquiry is whether the inevitable burden of a race-conscious program on nonminorities is so great as to be intolerable, and particularly whether the program unreasonably "disrupt[s] . . . settled expectations." *Wygant*, 476 U.S. at 283 (plurality opinion). Here, petitioner was permitted to compete for the license, never had a right to obtain the license, and is not losing a license that it already owns. Although no doubt disappointed with the result of the comparative hearing, petitioner is not remotely in the same position as would be an incumbent licensee required to surrender a license to

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[25] It does not matter for this purpose that the goal is diversity of expression rather than direct "eradication of discrimination." Once there is a compelling purpose for a race-based program, then the issue becomes whether it is "narrowly tailored" to that purpose. One consideration in that regard is whether the program imposes an undue burden on nonminorities, and that analysis turns on an assessment of the actual burden imposed, not the purpose of the program. This Court has upheld programs imposing a relatively light burden on nonminorities whether the compelling purpose advanced was diversity, as in *Bakke*, ensuring minority voting rights, as in *United Jewish Organizations*, or redressing discrimination, as in *Fullilove*.

a minority broadcaster. The proper analogy, therefore, is not to a layoff, which places the "entire burden of achieving racial equality on particular individuals, often resulting in serious disruption of their lives" (*ibid.*), but to an affirmative action hiring program, in which the burden "is diffused to a considerable extent among society generally." *Id.* at 282. See also *United Steelworkers v. Weber*, 443 U.S. 193 (1979) (approving affirmative action hiring plan under Title VII, noting that it did not require discharge of any employee).

The plea that the burden imposed on petitioner is unacceptable because this license represents a "unique opportunity" is unavailing. Petitioner may have preferred this particular license, but it has no more lost a "unique opportunity" than has the student denied admission to the college of his choice because of an affirmative action program, or the worker denied his best (and perhaps only) opportunity for employment or promotion because of a race-conscious plan. Indeed, an individual who loses a specific job opportunity or a promotion, or a student denied admission to the college of his choice, likely suffers a greater detriment than does a business entity that fails to obtain a specific license. As the Acting Solicitor General notes (U.S. Br. 21 n.12), "[l]arge numbers of radio and television stations are transferred each year in private transactions that appear to be routinely approved by the FCC"[26]; petitioner is free to pursue any of those licenses.

Moreover, a disappointed applicant hardly has grounds to complain that in choosing between applicants with essentially equal qualifications the Commission acted to further the strong public interest in diversity of expression, rather than basing its decision on some less important consideration or on the flip of a coin. In awarding

[26] Citing Broadcast/Mass Media Application Statistics, FCC Ann. Rep. (Fiscal Years 1979-1988), the Acting Solicitor General estimates (U.S. Br. 21 n.12) that "9% of all broadcast stations (representing roughly 1000 radio stations and 250 television stations) are sold in any given year (based on averages over the past 10 years)."



licenses the public interest must be the Commission's first and foremost consideration. Congress and the Commission have identified a compelling public interest in promoting diversity of expression, and it would be incongruous indeed if the Commission could not use that compelling interest to tip the balance between otherwise equally qualified applicants, neither of whom has any right to the license.

***3. Effective race-neutral alternatives are not available.***

In determining whether a particular program is narrowly tailored, this Court has also evaluated as one factor whether "lawful alternative and less restrictive means could have been used" instead of a race-based classification. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion); see *Croson*, 109 S. Ct. at 728 ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the efficacy of alternative remedies.") (quoting *United States v. Paradise*, 480 U.S. 149, 171 (1987)). Here, the Commission attempted to address the problem of underrepresentation of minority viewpoints through equal employment opportunity measures and ascertainment proceedings. After concluding that these measures were inadequate, the Commission adopted the minority enhancement program. It is simply not fair or accurate to say that race-neutral alternatives were not considered. See *Commission Policy Regarding the Advancement of Minority Ownership in Broadcasting*, 92 FCC 2d 849 (1982).

In a very real sense, however, the Commission is foreclosed from pursuing the ostensibly most effective race-neutral alternative. As explained above, the First Amendment will not permit the Commission to regulate broadcasting content directly, nor is that result desirable. In a number of areas—not just with race—the Commission has followed the sensible course of seeking diversity among broadcasters as the best practical means to ensure diversity of expression. This approach does not reflect an inappropriate attempt to accomplish indirectly what the

Commission could not do directly, but rather furthers First Amendment values by facilitating expression of diverse views without involving government in the offensive business of regulating speech.

#### 4. *The program's goal is not "too indeterminate."*

Following Judge Williams' dissent (Pet. App. 26a), petitioner argues that the minority enhancement program is not narrowly tailored because its goal of diversity in expression is too indeterminate for anyone to know when it has been accomplished.

But this objection evaporates with the recognition that Congress and the Commission acted within their power in determining that diversity of ownership will promote diversity of expression. The focus on ownership, rather than the elusive (and offensive) task of defining "minority programming," provides a ready measure of the minority enhancement program's success, *i.e.*, the number of minority broadcasters. Just as the Harvard admissions program attached as an appendix to Justice Powell's opinion in *Bakke* recognized that the number of minorities is important, but did not set any quota, so Congress and the Commission can look at the number of minority broadcasters without setting a quota. The infinitesimally small number of minorities now in the broadcast industry must be increased if diversity is to be achieved. Congress and the Commission can evaluate on an ongoing basis the continuing need for the minority enhancement program as the number of minority broadcasters increases.

This aspect of the program does not in any way render it "a stalking horse for making license ownership replicate the racial proportions of the population at large" (Pet. App. 27a (Williams, J., dissenting)) or "discrimination for its own sake" (*Bakke*, 438 U.S. at 307 (opinion of Powell, J.)). Congress and the Commission are not pursuing diversity of ownership as a goal in itself, but rather as an appropriate means to accomplish a compelling purpose, diversity of expression in broadcasting. This Court has never held that it is unlawful to encourage racial diversity among participants in a field of endeavor where necessary to accomplish an important purpose. To the contrary, *Bakke* approved just such a program. There is simply no basis in the record to think that Congress and the Commission have a secret, inappropriate purpose. Due respect for a co-equal branch of government precludes a court from engaging in speculation or making unsubstantiated assumptions about Congress's "real" motive. Cf. *Bakke*, 438 U.S. at 318 (opinion of Powell, J.) ("And a court would not assume that a university, professing to employ a facially nondiscriminatory admission policy, would operate it as a cover for the functional equivalent of a quota system.").



#### 5. *The program is as narrow as it can be, consistent with the First Amendment.*

Petitioner also argues that the minority enhancement program is not narrowly tailored because it does not require an individualized determination whether a particular applicant will present "minority broadcasting." But the First Amendment considerations precluding direct regulation of broadcast content discussed above make it inappropriate to engage in such determinations. The approach endorsed by Congress is as narrow as it can be, consistent with important First Amendment values.[27]

In sum, this Court has never held that the factors discussed above are elements of a test, all of which must be fully satisfied for a program to be "narrowly tailored." Rather, the Court has examined these factors as considerations relevant to the determination of whether the program chosen by Congress fits closely with the goal to be advanced.

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[27] There is no call to reexamine here whether affirmative action plans designed to remedy discrimination may benefit individuals who were not themselves victims of discrimination. That issue is irrelevant where, as here and in *Bakke*, the program at issue has a compelling goal apart from remedying discrimination.

Here, the Commission's congressionally mandated policy of considering race as one factor in comparative licensing hearings alleviates the documented underrepresentation of minority viewpoints in broadcasting, without imposing an undue burden on nonminorities. The policy is carefully designed to respect both the sensitivity of classifications based on race and the important First Amendment values implicated by regulation of broadcasting. As such, the policy is "narrowly tailored" to its purpose of encouraging diversity of expression.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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